IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

MYRTLE DYSON MILES

Petitioner

versus

CITY-PARISH GOVERNMENT, ET AL.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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Myrtle Dyson Miles prays that a writ of certiorari issue to review the judgment of the Louisiana Supreme Court entered December 7, 1971, Docket No. 51,945 of said Court.

OPINIONS BELOW

The opinion of the Court of Appeal, First Circuit, of the State of Louisiana, is reported in 253 So.2d 681. The action of the Supreme Court of Louisiana in refusing an application for a writ was rendered with two dissents on December 7, 1971. It is not yet reported. A copy of the action of the Supreme Court of Louisiana is attached hereto as Appendix "A". A copy of the decision of the Court of Appeal, First Circuit, State of Louisiana, is attached hereto as Appendix "B".

JURISDICTION

This application for a review of the decision of the State Court is made pursuant to 28 U.S.C. § 1257(3) on the basis that a right specifically set up under the Constitution of the United States is being denied. The procedure in Louisiana does not authorize a second application for a writ of certiorari to the Supreme Court of the State nor an application for a rehearing of a refusal to grant a writ. The pertinent rule of the Supreme Court of Louisiana is attached as Exhibit "C".

QUESTIONS PRESENTED

1. Whether the right to recover damages for the wrongful death by drowning of very young illegitimate Negro children can be constitutionally avoided in the face of undeniable negligence on the part of the City-Parish Government simply by holding that the dangerous pool in which the children drowned had some useful public service.

2. Whether this misapplication of the attractive nuisance doctrine, which is not peculiar to Louisiana, is a denial of due process of law.

STATUTES INVOLVED

1. Article 2315 of the Revised Civil Code of Louisiana, copy of which is attached as Exhibit "D".

STATEMENT OF THE CASE

Louisiana, along with many other states, for the purpose of discouraging the having of children out of wedlock, had an established policy of denying to parents of illegitimate children the right to recover for their wrongful death. When this

present litigation commenced the suit was dismissed on that basis January 17, 1968.

In *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, and *Levy v. Louisiana*, 391 U.S. 68, this Court overturned such a decision of the United States District Court for the Eastern District of Louisiana, which had been affirmed by the United States Court of Appeals for the Firth Circuit, 379 F.2d 545. In doing so, Your Honors said:

> "Yet we see no possible rational basis (More v. Doud, 354 U.S. 457, 465-466, 77 S.Ct. 1344, 1349-1350, 1 L.Ed.2d 1485) for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a casual connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability. * * *"

After that decision the Court of Appeal reversed the District Court 219 So.2d 320 (1969). This case then proceeded to trial but recovery has been denied. On appeal the Court of Appeal said:

> "The facts of the case are not in dispute. Kathy, aged 9, and Rayfus, aged 5, had been left in the care of their older sister while plaintiff was at work. Kathy told the sister that Rayfus was at the canal, and she was sent to bring him back. The sister, who was eight months pregnant, followed. When she arrived at the canal, both Kathy and Rayfus were in the water and drowned before help could be summoned.

> "The canal is described as being 15 to 20 feet wide and six feet deep at the point of the drowning. Its banks are described as being steep. There were no fences or warning signs of any kind at the time of the accident, although a fence was later constructed at that point." [After a third drowning.]

The Court found that the utility of the canal was established and that the doctrine of attractive nuisance was not applicable.

ARGUMENT

I. Liability under the attractive nuisance or "turntable" doctrine is not the creature of Louisiana law but found its origin in *Sioux City & Pacific Railway v. Stout*, 17 Wall. 657 (1874). It became firmly embedded in the law of Louisiana with the decision in *Saxton v. Plum Orchards*, 215 La. 378, 40 So.2d (1949), though it had been recognized and accepted much earlier as indicated therein. It represents the principle set out in Article 2315 of the Louisiana Civil Code. This article provides:

> "Every act whatever of man which causes damages to another obliges him by whose fault it happened to repair it."

An amendment to this codal article long ago adopted the wrongful death statute known as Lord Campbell's Act.

The Louisiana requirements for applying the attractive nuisance doctrine are no different from those generally in use throughout the Nation. See Prosser on Torts, 2d Ed. §76, p. 440. These requirements, as formulated in Section 339 of Restatement of Torts, 2d Edition, are:

> "A possessor of land is subject to liability for physical

harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

Added by the American Law Institute is the following:

"Comment on Clause (d):

n. Balancing risk to children with utility of dangerous condition.

In determining whether a particular condition maintained by a possessor upon land which he knows to be subject to the trespasses of children involves an unreasonable risk to them, the comparison of the recognizable risk to the children, with the utility to the possessor of maintaining the condition, is of peculiar importance."

The presence of the children was known; the people protested converting a simple ditch into a deep canal because of its danger to their children; because of the protest the work was stopped and has never been finished but the dangerous condition already created was not fenced to protect the children from it.

The remainder of the Comment on Clause (d) follows:

"The public interest in the possessor's free use of his land for his own purpose is of great significance. A particular condition is, therefore, regarded as not involving unreasonable risk to trespassing children unless it involves a grave risk to them which could be obviated without any serious interference with the possessor's legitimate use of his land. Farming machinery and the like involve inevitable danger to children meddling with them. Nevertheless their essential importance to agriculture permits them to be used and maintained if kept in a proper place and in proper condition. On the other hand, if the installation of devices which would prevent the machine's being set in motion were practicable without burdensome cost or serious interference with the utility of the machine, it might be unreasonable for a farmer to keep a machine without such equipment in a place notoriously open to trespassing children. While wires are necessary to carry high-tension electric current, the burden of properly safeguarding wires maintained at places where trespassing children may be expected to come into contact with them is obviously slight as compared with the gravity of harm which they threaten and the chance that such harm will result.

"Illustrations:

"9. The A Railway Company maintains a *turntable* at a point upon its unfenced land close to a highway upon which young children constantly pass on their way to and from school. These children, to the knowledge of the Company, are in the habit of playing about and upon the turntable. *A simple locking device* would make it very difficult for children to set the turntable in motion, but this device is not installed upon the turntable. While the children are playing about the turntable several of them set it in motion, causing B, one of them, to be caught in the

table and seriously hurt. The A Railway Company is subject to liability to B.

> "10. Under the circumstances stated in Illustration 9, the A Railroad Company would not be liable to B, injured while playing upon its turntable, if a locking device capable of preventing children from setting the turntable in motion would have prevented its effective operation and if to surround it with a reasonably child-proof fence would have seriously interfered with the operation of the railroad." (Italics supplied)

A simple fence, the one that the Parish put after the third drowning, would have saved these lives, and no amount of utility of the ditch or pond could possibly negate that fact.

The neighborhood in which this tragedy occurred is one which in a big city would be classified as a slum area. The area is inhabited by Negroes in a very poor economic level and their families had 123 little children living here.

The City-Parish began the construction of a canal and C. Robert Carter, an owner, protested to the City-Parish Council that such a canal in such a neighborhood would inevitably lead to the drowning of the children. The newspapers published statements to the Council and the Council caused the work to stop, but not until this part of the canal had been dug just a few feet away from the residence in which the plaintiff lived with her little children.

The banks to the unfinished canal were steep. There was no fence. There was not even a warning sign. The banks were so steep that when a man and teen-aged boy jumped in to try to save the children or recover the bodies they were unable to climb out of the canal without help. None of this is disputed; nor is it disputed that when little Kathy came to her older sister, eight months pregnant, and said that little Rayfus

only 5 years of age was in the pool, the sister sent her back to get their little brother, who at his tender age could not legally have the judgment to protect himself and who under recognized and oft repeated Louisiana law was incapable of negligence.

In *Saxton v. Plum Orchards*, supra, the Supreme Court of Louisiana found that the defendant had excavated a place "for the three-fold purpose of draining the immediate area, of obtaining dirt for filling, and of providing sewerage." In the *Saxton* case, the family moved in after the pool was dug. In the present case, this partial canal was dug after the place was fully inhabited, and in the face of the fact that the inhabitants were complaining of the menace to their children being created by digging it. There, a four year old child got into the pool which had steep banks, and drowned. Here, a five year old child got into the water and drowned. There, after the tragedy, the pool was filled. Here, after this tragedy and another drowning, the area was fenced. But no steps had been taken to protect the children either in the *Saxton* case or in the present case until after their deaths.

In the *Saxton* case, as here, there were no eye witnesses. The Court said:

> "* * * a strong inference arises from the circumstantial evidence that the child walked or fell into the pool and that her death resulted solely from drowning. * * * And since this inference has not been overcome or rebutted it will be accepted as establishing the manner and cause of death. [Citations]"

Though the utility of the pool in *Sexton* was acknowledged, the Court held all of the requirements to be met and the attractive nuisance doctrine applicable.

II. While the Fourteenth Amendment does not raise a Federal question in *every* case to test the justice of a decision,

this Court has clearly recognized that "'due process" represents a living principle and is not confined within a permanent catalog of what may at a given time be deemed the limits or essentials of fundamental rights. See *Wolf v. People of the State of Colorado*, 338 U.S. 25, in which the Court, through Justice Frankfurter, added:

> "[3] To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion." Davidson v. New Orleans, 96 U.S. 97, 104, 24 L.Ed 616. This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since Davidson v. New Orleans was decided."

In this instance the District Court which believed at first no action would lie because these children were illegitimate children, while yielding, of course, to the contrary holding of this Court, nevertheless denied recovery simply by holding that the canal was dug to serve a utilitarian purpose. This is only one of the tests applied throughout the country with respect to the attractive nuisance principle and only one of the tests heretofore applied by the Courts of Louisiana. To resort to that test to exculpate the City-Parish from its culpability is particularly inappropriate here, for the work was stopped after the public protest of the residents of thie neighborhood before the children were drowned, and has never been finished, so its "need" or "utility" is surely in doubt. To

say that because a need or public utility exists makes negligence through an attractive nuisance inapplicable would mean that whenever the public digs some pond or canal or installs anything at all to serve some public purpose it can ignore the danger it is creating for children. Such a holding is a substantive denial of due process. We believe Your Honors would speedily so hold if a legislature so pronounced. The pronouncement by a Court does not make it any less invalid.

CONCLUSION

It is submitted that the holding of the Court of Appeal, First Circuit, State of Louisiana, exculpating from liability the City-Parish Government, despite the deep canal with steep banks - in a neighborhood where many disadvantaged Negro children were known to live - for which "there were no fences or warning signs of any kind to the time of the accident, although a fence was later constructed at that point," simply because the canal was found to have a useful purpose, is a substantive denial of due process.

Accordingly, a writ of certiorari should issue herein to review the aforesaid judgment and after due proceedings had, the judgment should be reversed and the case remanded with instructions to apply th law of Louisiana so as to award damages to the plaintiff for the wrongful death of her two little children.

Respectfully submitted:

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PROOF OF SERVICE

I, Victor A. Sachse, attorney for Myrtle Dyson Miles, petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1972, I served a copy of the foregoing petition for a writ of certiorari, and its appendices, on the City of Baton Rouge, respondent in connection with this application for a writ of certiorari, by mailing three copies thereof to its counsel of record, Mr. Joseph F. Keogh, at his office at the Municipal Building, Baton Rouge, Louisiana.

_____

Victor A. Sachse

APPENDIX "A"

SUPREME COURT OF LOUISIANA

NEW ORLEANS 70112

MYRTLE DYSON MILES — December 7, 1971

V.

CITY-PARISH GOVERNMENT OF EAST BATON ROUGE PARISH, ET AL — NO. 51,945

In re: Mrs. Myrtle Dyson Miles applying for certiorari, or writ of review, to the Court of Appeal, First Circuit, Parish of East Baton Rouge.

Writ refused. On the facts found by the Court of Appeal, we find no error of law in its judgment.

/s/ WBH
/s/ EHMcC
/s/ JWS
/s/ FWS

TATE, J., respectfully dissents, being of the opinion that the reasoning and result is inconsistent with the principles announced by this Court in Saxton v. Plum Orchards, 215 La. 378, 40 So. 2d 791.

DIXON, J., dissents from the refusal.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
December 7, 1971

/s/ Harold A. Moise, Jr.
Clerk

APPENDIX "B"

MYRTLE DYSON MILES	NO. 8516
V.	FIRST CIRCUIT
CITY-PARISH GOVERNMENT,	COURT OF APPEAL
ET AL	STATE OF LOUISIANA

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, HONORABLE MELVIN A. SHORTESS, JUDGE

BEFORE: LANDRY, ELLIS, AND BLANCHE, JJ

ELLIS, J:

This is a suit by Myrtle Dyson Miles, plaintiff, for damages for the alleged wrongful death of her two minor children, Kathy Marie Richard and Rayfus O'Neal Richard, who drowned in the Northdale Canal in Baton Rouge on April 27, 1966. Defendants are the Parish of East Baton Rouge, C. Robert Carter and William Louis Albritton. After trial on the merits, plaintiff's suit was dismissed and she has appealed.

It is not claimed by plaintiff that the trial court erred in dismissing the suit as to Mr. Carter and Mr. Albritton, and the claim as to them is considered to be abandoned.

The facts of the case are not in dispute. Kathy, aged 9, and Rayfus, aged 5, had been left in the care of their older sister while plaintiff was at work. Kathy told the sister that Rayfus was at the canal, and she was sent to bring him back. The sister, who was eight months pregnant, followed. When she arrived at the canal, both Kathy and Rayfus were in the water and drowned before help could be summoned.

The canal is described as being 15 to 20 feet wide and six feet deep at the point of the drowning. Its banks are described

as being steep. There were no fences or warning signs of any kind at the time of the accident, although a fence was later constructed at that point.

Plaintiff contends that the Parish was negligent in the manner in which it maintained the canal, and that she is further entitled to recovery under the attractive nuisance doctrine.

The first of the above contentions is based on the fact that the banks of the canal were so steep that it was virtually impossible to climb out of the canal. It is contended that this constitutes a hazardous condition, which the Parish negligently failed to rectify.

In the case of *Slaughter v. Gravity Drainage District No. 4*, 145 So. 2d 50 (La. App. 3 Cir. 1962), the court was faced with an identical situation. In dismissing the case, the court said:

> "In determining whether a body of water is an attractive nuisance in a particular case, many factors must be considered, such as the age of the child, his ability to understand and avoid dangers, whether the proprietor has reason to anticipate the presence of children, whether there was a strong likelihood of the accident and whether the danger was one other than those ordinarily encountered. Other factors to be considered include whether the facility did or did not serve a necessary or useful purpose, what means could have been employed to avoid the danger, and whether the precautions taken were reasonable.
>
> * * *
>
> "There, of course, are inherent dangers of drowning in every body of water, including a canal. A drainage district which constructs and maintains a canal as a part of its public functions, however, does not become the insurer of the lives and safety of all children who

> come near the waterway. Where the canal is open and in full view of those who come near it, the facility itself serves as a warning of the dangers whcih are apparent especially to those who are of the age of discretion. Where the danger is not hidden or concealed and there are no unusual circumstances which render the facility peculiarly attractive to young children, we think there is no duty on the part of the drainage district to provide safeguards against persons falling into the excavation, such as fences or warning signs. Where those conditions exist the drainage district has the right to presume that for every child under the age of discretion, there is some one of mature judgment on whom rests the special duty and responsibility for the safety of the child. Also, we feel that the construction of the canal with extremely deep inclines along its banks or sides alone does not constitute actionable negligence on the part of the drainage district."

We find the foregoing to be determinative of the issues here presented.

The utility of the Northdale Canal is fully established by the record. Neither is there shown to be anything out of the ordinary about this canal which would tend to render it unusually attractive to children of tender years. We find the doctrine of attractive nuisance to be inapplicable to the instant case. We further find that the fact of the steepness of the banks is not sufficient to constitute negligence on the part of the Parish.

The judgment appealed from is affirmed, at plaintiff's cost.

AFFIRMED.

APPENDIX "C"

RULE XI. REHEARINGS

* * * * *

Section 5. An application for a rehearing will not be considered when the court has merely granted or refused to grant a writ of certiorari or review or an alternative writ of mandamus or prohibition, or rule nisi, but a petition for rehearing, if filed within the legal delay, will be considered when the Court has decided a case on a writ of review to the Court of Appeal, or under the court's supervisory jurisdiction, the same as if the case had been decided on appeal.

APPENDIX "D"

Art. 2315. Liability for acts causing damage; survival of action

Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively. *(Amended by Acts 1948, No. 333, § 1; Acts 1960, No. 30, § 1.)*